

Before the  
Federal Communications Commission  
Washington, DC 20554

RECEIVED  
JUN - 9 1992  
ORIGINAL  
FILE  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. 92-70
SABLE COMMUNITY BROADCASTING	)	File No. BPED-851003MB
CORPORATION	)	
Channel 217A	)	
Hobson City, Alabama	)	
BOARD OF TRUSTEES SHORTER COLLEGE	)	File No. BPED-860205MD
Channel 217A	)	
Rome, Georgia	)	
GADSDEN STATE COMMUNITY COLLEGE	)	File No. BPED-860307MK
Radio Station WSGN(FM)	)	
Channel 217A	)	
Oxford, Alabama	)	
TRINITY CHRISTIAN ACADEMY	)	File No. BPED-860512MB
Channel 217A	)	
Oxford, Alabama	)	
For Construction Permit for	)	
New and Modified Noncommercial	)	
FM Facilities on Channel 217	)	

To: The Honorable Arthur I. Steinberg  
Administrative Law Judge

OPPOSITION TO MOTION TO DISMISS

Gerald Stevens-Kittner  
ARTER & HADDEN  
1801 K Street, NW, Suite 400  
Washington, DC 20006  
(202) 775-7138

Attorneys for SABLE COMMUNITY  
BROADCASTING CORPORATION

June 9, 1992

No. of Copies rec'd 046  
List A B C D E

### SUMMARY OF ARGUMENT

Sable Community Broadcasting Corporation ("Sable") hereby responds to a Motion to Dismiss its application filed by its lone competitor, Trinity Christian Academy ("Trinity"), for authorization to construct a new noncommercial educational FM broadcast facility on Channel 217 at Hobson City, Alabama.

Sable shows herein that its omissions to date, i.e., a late Notice of Appearance, and a failure to file amendments addressing local public notice and an environmental assessment, have not prejudiced the other parties or the conduct of this proceeding. Controlling precedent reveals quite clearly that Sable's conduct does not rise (or stoop) to the level of the kind of egregious, dilatory behavior which warrants the drastic sanction of dismissal. At most, the appropriate response to Sable's failure to amend its application is to designate issues. Indeed, the Audio Services Division has already designated a contingent environmental issue. Sable is today filing an amendment to its application which, in all likelihood, will eliminate even the need even for the designated environmental issue.

This proceeding is still in its very early stages. No lasting harm will have been occasioned by Sable's conduct to date. The public interest lies in having a choice between applicants, particularly in a noncommercial case, and particularly because Sable is a minority applicant. Trinity's Motion to Dismiss should be denied.

## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY OF ARGUMENT . . . . .	ii
I. Introduction . . . . .	2
II. Sable's Late-Filed Notice of Appearance Does Not Warrant the Dismissal of Sable's Application . . . . .	3
III. Sable's Failure to Respond to the Commission's November, 1991 Letter, and to Amend Its Application Within Thirty Days of the Release of the Hearing Designation Order Do Not Warrant Dismissal . . . . .	8
IV. Conclusion . . . . .	12

RECEIVED  
JUN - 9 1992  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
Federal Communications Commission  
Washington, DC 20554

In re Applications of	)	MM Docket No. 92-70
	)	
SABLE COMMUNITY BROADCASTING	)	File No. BPED-851003MB
CORPORATION	)	
Channel 217A	)	
Hobson City, Alabama	)	
	)	
BOARD OF TRUSTEES SHORTER COLLEGE	)	File No. BPED-860205MD
Channel 217A	)	
Rome, Georgia	)	
	)	
GADSDEN STATE COMMUNITY COLLEGE	)	File No. BPED-860307MK
Radio Station WSGN(FM)	)	
Channel 217A	)	
Oxford, Alabama	)	
	)	
TRINITY CHRISTIAN ACADEMY	)	File No. BPED-860512MB
Channel 217A	)	
Oxford, Alabama	)	
	)	
For Construction Permit for	)	
New and Modified Noncommercial	)	
FM Facilities on Channel 217	)	

To: The Honorable Arthur I. Steinberg  
Administrative Law Judge

OPPOSITION TO MOTION TO DISMISS

Sable Community Broadcasting Corporation ("Sable"), by its attorneys, hereby opposes the Motion to Dismiss Sable's application filed by Trinity Christian Academy ("Trinity") on May 29, 1992. Trinity's Motion must be denied because Sable has not engaged in a pattern of repeated and unexplained failures to comply with procedural deadlines, and neither the parties nor the process have been unduly prejudiced by Sable's conduct.

## I. Introduction.

Trinity's Motion is based on the following:

1) Sable filed a Notice of Appearance on May 19, 1992, thirteen days after the deadline;

2) Sable failed to respond to a letter dated November 26, 1991 to all of the parties to this proceeding requesting certain additional information concerning their respective applications;

3) Sable did not file an amendment to its application within thirty days of the release of the Hearing Designation Order addressing the impact on the environment of its application, and whether it had complied with the local public notice requirements of Section 73.3580 of the Commission's rules.

On the basis of these three acts by Sable, Trinity citing various cases where applications were dismissed for failure to prosecute, urges the ultimate sanction against Sable. As will be shown herein, each of the cited cases is readily distinguishable. Nothing Sable has done or not done to date warrants the drastic sanction of dismissal of its application. This comparative proceeding is still in its very early stages, and Sable has yet to miss one deadline established by the Presiding Judge in his Order Prior to Prehearing Conference, FCC 92M-493, released April 24, 1992. Accordingly, there is no basis to conclude that Sable's conduct to date has so prejudiced the other parties or the conduct of this proceeding as to warrant the dismissal of Sable's application.

II. Sable's Late-Filed Notice of Appearance Does Not Warrant the Dismissal of Sable's Application.

Section 1.221(c) of the Commission's rules states as follows:

In order to avail himself of the opportunity to be heard, the applicant, in person or by his attorney, shall, within 20 days of the mailing of the notice of designation for hearing by the Secretary, file with the Commission, in triplicate, a written appearance stating that he will appear on the date fixed for hearing and present evidence on the issues specified in the order. Where an applicant fails to file such a written appearance within the time specified, or has not filed prior to the expiration of that time a petition to dismiss without prejudice, or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days, the application will be dismissed with prejudice for failure to prosecute. (Emphasis added.)

On June 4, 1992, Sable filed a Motion for Acceptance Nunc Pro Tunc of Late-Filed Notice of Appearance. In its Motion, Sable proffered reasons constituting good cause for why its May 19, 1992 notice of appearance should be accepted, as contemplated by the underlined language quoted above from Section 1.221(c) of the Commission's rules. Sable pointed out that it is within the Presiding Judge's discretion whether to accept a late-filed notice of appearance, citing John Spencer Robinson, 5 FCC Rcd. 5542 (Rev. Bd. 1990).

In Robinson, the Review Board concluded that the ALJ's dismissal of an applicant due to the applicant's failure to timely file a hearing fee was "unduly harsh." 5 FCC Rcd. at 5544. The Review Board looked at all of the underlying circumstances and concluded that the applicant did not abuse the Commission's processes, engage in "gamesmanship," or seek to garner an unfair advantage by ascertaining which of the competing applicants had paid their fees. Id. Accordingly, the Review Board concluded that

equitable considerations justified allowing the applicant to continue to prosecute its application.

In this case, it is obvious that Sable did not engage in gamesmanship or try to obtain an unfair advantage over its competitors by filing a notice of appearance after the deadline. Sable was effectively unrepresented by counsel, and simply did not understand its obligations.<sup>1</sup> Furthermore, Sable did file a Notice of Appearance well before the first procedural deadline established by the Presiding Judge, and therefore will be able to fully participate in the proceeding without unduly prejudicing the process or the parties.

The first procedural deadline established by the Order Prior to Prehearing Conference was June 5, 1992, by which time the parties were directed to confer for the purpose of exploring settlement, discovery, and other issues. On June 4, 1992, the undersigned contacted counsel for the Mass Media Bureau, for Trinity and for Gadsden State Community College ("Gadsden"), and advised each that Sable intends to go forward with its application. Since Gadsden has filed a technical amendment to its application which, when granted, will remove it as a party to this proceeding, and since Board of Trustees, Shorter College has requested the voluntary dismissal of its application, this has effectively become a contest between Trinity and Sable. Trinity does not wish to engage in discussions with Sable which contemplate Sable's

---

<sup>1</sup> In Robinson, one of the equitable considerations had to do with the fact that the applicant, although a lawyer, was not a communications lawyer. 5 FCC Rcd. 5542-43. Here, Sable was assisted by a lawyer who sits on Sable's Board of Directors, but the assisting lawyer also was not a communications lawyer.

participation, such as arranging for a joint engineering exhibit, setting a deposition schedule, and agreeing on a joint document production request, until Sable's status is clarified. However, Sable remains ready, willing and able to fully comply with the Order Prior to Prehearing Conference.

Furthermore, even if Trinity chooses to wait until the Presiding Judge rules on its Motion to Dismiss before conferring with Sable on the tasks set out in the Order Prior to Prehearing Conference, there should still be a month or more before the July 21, 1992 deadline for a preliminary exchange of the joint engineering exhibit, and the July 31, 1992 deadline for the completion of all discovery.<sup>2</sup> That should be an adequate amount of time within which to complete those tasks.

Although Trinity would understandably prefer not to have to compete for the license with Sable, the public interest lies in having a choice between applicants. In The Denton Channel Two Foundation, Inc., 49 RR2d 427 (1981), the Commission waived a cut-off rule in order to allow a noncommercial applicant which had filed its application late to compete for the reserved frequency. In granting the waiver, the Commission obviously created a good deal of prejudice to the other party, and a certain degree of disruption to the proceeding, but the Commission decided that the

---

<sup>2</sup> The pleading cycle on Trinity's Motion to Dismiss ends with this Opposition. Trinity and the other parties have until tomorrow, June 10, 1992, to respond to Sable's Motion to have its late-filed Notice of Appearance accepted. At that point, a decision on the status of Sable's application should be ripe. Even if Trinity opposes Sable's Petition for Leave to Amend, being filed today, a decision on Sable's status need not await a decision on the Petition for Leave to Amend.



public interest benefit in having a choice among applicants outweighed those considerations.

Here, we are dealing with an applicant who timely filed its application, but after waiting six and one half years for the application to be designated, inadvertently filed its notice of appearance thirteen days late. The circumstances here are equally, if not more compelling than were the circumstances in The Denton Channel Two proceeding, and warrant a similar result, i.e., acceptance of Sable's late-filed notice of appearance.<sup>3</sup>

The cases cited by Trinity on page 2 of its Motion to Dismiss for the proposition that a late-filed notice of appearance is grounds for dismissal all involved commercial applicants where the ability to find out which competitors timely filed a hearing

---

<sup>3</sup> As in the Denton case, Sable is a noncommercial applicant. As Sable pointed out in its Motion to have its late-filed Notice of Appearance accepted, the Commission applies more lenient standards to noncommercial applicants than it does to commercial applicants. This is as it should be. Noncommercial applicants often have far fewer resources and far less experience dealing with the Commission than do many commercial applicants. This is certainly the case with Sable.

Sable's case may be even more compelling than the applicant's case in Denton because, as the Declaration of Ms. Maudine Holloway, President of Sable, attached hereto establishes, each of the members of Sable's Board of Directors is Black. The Commission stated in Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 99 FCC 2d 1249 (1985):

The Commission has long supported increased minority participation and ownership in the broadcast industry. Such participation benefits not only minorities, but the general public as well, by diversifying control of the media and thus the selection of available programming.

Sable's Board is made up of interested and concerned members of the local minority community, including the Mayor of Hobson City, and several social service workers. Sable's participation in this proceeding would certainly further the Commission's public interest goals of supporting increased minority participation in the broadcast industry.

fee unfairly advantaged the late-filing applicant. In CSJ Investments, Inc., 5 FCC Rcd. 7653 (1990), not only did the applicant fail to timely file a notice of appearance and a hearing fee, but the applicant missed the subsequent date, ten days after the deadline, the applicant had promised to comply with in a motion for extension of time. In Juan Galiano, 5 FCC Rcd. 6442 (1990), recon. denied, 6 FCC Rcd. 895 (1991), the applicant's excuses for not filing its notice of appearance and hearing fee turned out to be fallacious. And in Silver Spring Communications, 3 FCC Rcd. 5049 (Rev. Bd. 1988), rev. denied, 4 FCC Rcd. 4917 (1989), the Commission decided it would unfairly prejudice the applicant's competitors to allow the late-filing applicant to decide whether to pay its hearing fee after the other parties had "shown their hand" by either paying or not paying the hearing fee.

Because this is a noncommercial case, no such prejudice to Trinity, or to the other parties resulted from Sable's late-filed Notice. The absence of the element of "gamesmanship" here makes the three cases cited by Trinity inapposite and not determinative of the proper disposition of Sable's Motion for acceptance nunc pro tunc of its late-filed Notice of Appearance. As Sable pointed out in its Motion, at page 5, the Commission applies different, more lenient standards to noncommercial applicants in a variety of ways, and this is certainly a situation where there is a legitimate basis for a distinction. Sable was not trying to save itself a \$6,760 hearing fee, nor did it cost the other parties any money to indicate to the Commission at this early stage of the proceeding that they intend to prosecute their application. The absence of

any prejudice to Sable's competitors makes the sanction of dismissal "unduly harsh" and unwarranted.

Sable should be allowed to participate in this proceeding notwithstanding the late-filing of its Notice of Appearance.

III. Sable's Failure to Respond to the Commission's November, 1991 Letter, and to Amend Its Application Within Thirty Days of the Release of the Hearing Designation Order Do Not Warrant Dismissal.

Trinity points to two other omissions of Sable as additional support for the dismissal of Sable's application. One involved Sable's failure to respond to a letter dated November 26, 1991 sent to all of the parties which requested that they each amend their applications within thirty days of the date of the letter. Sable was directed to submit an environmental impact statement and proof that it published local notice of the filing of its application, pursuant to Section 73.3580 of the Commission's rules. The other omission by Sable was in not amending its application to provide the same information as requested in the November 26, 1991 letter within thirty days of the release of the Hearing Designation Order, DA 92-412, released April 15, 1992.

Clearly, neither omission rises to the level of the kind of egregious, repeated failure to comply with procedural deadlines that warrants dismissal for failure to prosecute. First and foremost, the kind of information Sable has been requested to provide is not the kind of information which, when not provided, results in outright dismissal. Rather, the appropriate response by the Commission is to specify issues.

Secondly, Section 73.3522 of the Commission's rules, while providing an amendment-as-of-right period following designation,

also contemplates the filing of amendments with good cause showings after the amendment-as-of right period expires. Thus, the mere fact that Sable did not amend its application within thirty days of the release of the HDO does not eliminate the opportunity for Sable to amend its application. Sable merely imposed upon itself the burden of accompanying its amendment with a good cause showing.

Being filed simultaneously herewith is a Petition for Leave to Amend and an amendment to Sable's application which shows that Sable did indeed publish local notice pursuant to Section 73.3580 of the Commission's rules. Thus, there is clearly no need to add a Section 73.3580 issue.

With respect to the environmental assessment, the HDO already added a contingent environmental issue, which may be deleted after the Mass Media Bureau evaluates the environmental assessments subsequently submitted by the parties. See HDO, ¶. 10. Sable's amendment includes a statement which addresses the impact on the environment of Sable's application. After the Mass Media Bureau evaluates the amendment, there may no longer be a need for a contingent environmental issue. However, even under a worst case scenario, Sable could be put to the task of litigating an environmental issue. Dismissal of its application is not the appropriate response to failing to file an amendment within thirty days of the HDO.

Under these circumstances, the sanction of dismissal would be disproportionate to the offense. In order to have a party dismissed for a failure to prosecute its application, an egregious pattern of disruptive conduct must be present. In Communi-Centre

Broadcasting, Inc. v. FCC, 856 F2d 1551 (D.C.Cir. 1988), the Court articulated the standard to be applied as follows:

In reviewing the dismissal of an applicant from a comparative proceeding, we think it clear that among the factors appropriate for consideration are the applicant's proffered justification for the failure to comply with the presiding judge's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct.

856 F2d at 1554. The Court further observed:

The Review Board acknowledged [earlier in this proceeding] that in some cases sanctions less severe than dismissal might be appropriate . . .

856 F2d at 1556 n. 40.

With respect to why Sable did not respond to the Commission's November, 1991 letter, attached hereto is a Declaration from Ms. Maudine Holloway, President of Sable. Ms. Holloway explains that neither she nor anyone else connected with Sable received the Commission's letter. That is not to say that Sable should not have made better arrangements to insure that it received mail from the Commission. However, Sable's innocent inefficiency in coordinating its mail-pickup procedures, particularly after waiting six years for the Commission's November, 1991 letter, is something entirely different than outright disregard for a Commission deadline. Clearly, Sable did not abuse or evidence disrespect for the Commission's processes, and outright dismissal in this case is not necessary in order to "punish abuse of the system and to deter future misconduct." 856 F2d at 1554.

Nor can it be maintained that Sable's omissions unduly prejudiced the other parties or burdened the administrative system. Its failure to respond to the November, 1991 letter was well before the case had been designated for hearing. Consequently, the Audio

Services Division was able to address Sable's omissions in the HDO by indicating that issues would be specified unless Sable amended its application. Sable is now amending its application to meet both the Section 73.3580 issue and the contingent environmental issue. Even if Sable's amendment did not fully eliminate the need for those issues, the appropriate course would be to litigate the issues, not to dismiss Sable's application. As the Court in Communi-Centre observed, sanctions short of outright dismissal are often appropriate. 856 F2d at 1556 & n. 40. This is such a case.

The cases cited by Trinity at page 5 of its Motion where parties to comparative proceedings were dismissed for failures to prosecute involved failures to comply with discovery deadlines, such as the repeated failure to produce documents, V.O.B. Incorporated, 4 FCC Rcd. 6753 (Rev. Bd. 1989), and frequent failures to comply with procedural and substantive deadlines. Mark A. Perry, 4 FCC Rcd. 650 (Rev. Bd. 1989).

None of the cases cited by Trinity come close to justifying the dismissal of Sable's application. Sable's omissions came either before the case was designated for hearing, or very soon after designation. They can be dealt with in the ordinary course of the proceeding, and are not the kind of omissions which frustrate the other parties or the orderly conduct of the litigation.<sup>4</sup>

---

<sup>4</sup> Unlike the failure to produce a witness for deposition or documents, where the other party or parties are frustrated after having expended time and effort preparing their case for trial, Sable has not caused Trinity to expend unnecessary expense or time reacting to a missed deadline by Sable. (Trinity's voluntary and self-serving efforts to have Sable's application dismissed should not be counted in this regard.)

#### IV. Conclusion.

In sum, Sable's failure to respond to the November, 1991 letter or to the HDO within thirty days is not the type of conduct which warrants dismissal for failure to prosecute. Nor does the lateness of its Notice of Appearance, coupled with the other omissions show a pattern or practice sufficient to warrant dismissal. Sable has explained why each of the omissions took place, and now that it is represented by counsel, no further omissions are contemplated. Under these circumstances, Sable's conduct does not meet the high standard for dismissals for failure to prosecute articulated in Communi-Centre. Furthermore, the public interest lies in having a choice between Sable and Trinity. See The Denton Channel Two Foundation, 49 RR2d 427 (1981).

WHEREFORE, for the foregoing reasons, Sable respectfully urges the Presiding Judge to deny Trinity's Motion to Dismiss.

Respectfully submitted,

SABLE COMMUNITY BROADCASTING  
CORPORATION

By: 

Gerald Stevens-Kittner  
ARTER & HADDEN  
1801 K Street, NW, Suite 400  
Washington, DC 20006  
(202) 775-7138

June 9, 1992

Its Attorneys

DECLARATION UNDER PENALTY OF PERJURY

I, Maudine Holloway, President of Sable Community Broadcasting Corporation, hereby declare under penalty of perjury that:

1) I have been the person principally responsible for organizing Sable's application efforts. Because it has been so many years since we filed the application, certain mail from the Commission has apparently gotten lost. I never received a letter from the Commission dated November 26, 1991 requesting that Sable provide certain information concerning the local public notice it published, and the possible impact of its application on the environment. There are a couple of possible explanations for why I did not receive the letter. The mailing address given in Sable's application is a building in which community programs are conducted. Between the time Sable's application was filed and November, 1991, the address of the building Sable had designated in its application had changed. It is possible that the Commission's November, 1991 letter was delivered to a different building, and the people who received it either did not know how to get the letter to me or did not bother with it. The other possibility is that one of the people who worked in the building designated in Sable's application received the Commission's letter but did not pass it on to me. In either case, neither I nor anyone else connected with Sable received the letter.

2) I believe I did receive the Hearing Designation Order prior to what I now understand was the May 5, 1992 deadline for notices of appearance, but at the time I was confused about how or by when I was supposed to respond. I tried to get help from an attorney who sits on Sable's Board of Directors but he was busy with other things and provided no assistance. Eventually, I prepared a notice

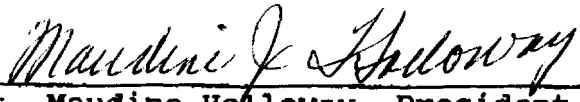


of appearance myself and asked the attorney to sign it and send it in. I also did not understand that Sable was supposed to file amendments to its application within 30 days of the release of the Hearing Designation Order. It was only after I retained Mr. Stevens-Kittner in early June, 1992 that he explained the deadlines and obligations to me.

3) Sable is a community-based organization, and each of the members of its Board of Directors are Black. The mayor of Hobson City is a member of Sable's Board. We also have the City Clerk, a retired school principal, a retired nurse, and several social service professionals. I myself am the Executive Director of Community Enabler Developer, Inc., a social service organization which assists local individuals and groups to help themselves to better their situations. Sable intends to operate the station in order to serve the poor, minority and disadvantaged population in its proposed service area. Sable has received roughly \$43,000 in pledges from several local businesses in the Hobson City area. If Sable's application is granted, we intend to promptly construct the station and operate it in a way that will serve the needs of the many disadvantaged people in the proposed service area.

The foregoing statements are true and correct to the best of my knowledge and belief.

June 8 , 1992

  
Ms. Maudine Holloway, President  
Sable Community Broadcasting  
Corporation

CERTIFICATE OF SERVICE

I, Michelle Jarrett, a secretary in the law firm of Arter & Hadden, hereby certify that on this 9th day of June, 1992, a copy of the foregoing OPPOSITION TO MOTION TO DISMISS was served by hand-delivery, unless otherwise indicated, to each of the following persons:

Honorable Arthur I. Steinberg  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W., Room 228  
Washington, D.C. 20554

Paulette Laden, Esquire  
Hearing Branch, Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 7212  
Washington, D.C. 20554

Larry D. Eads, Chief  
Audio Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W., Rm. 302  
Washington, D.C. 20554

Harry C. Martin  
Andrew S. Kersting  
Reddy, Begley & Martin  
1001 22nd Street, N.W.  
Suite 350  
Washington, D.C. 20037  
Counsel for Trinity Christian Academy

\* Board of Trustees  
Shorter College  
Shorter Hall  
Rome, Georgia 30101-9989

M. Scott Johnson, Esq.  
Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900 East Tower  
Washington, D.C. 20005  
Counsel for Gadsen State Community College

  
\_\_\_\_\_  
Michelle Jarrett

\* via First Class U.S. Postal Service,  
Postage Prepaid